

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:NEW:1:TL-N-6594-00
RTBennett

date: MAR 8 2001

to: John Capalbo, LMSB Team Manager
LMSB Group 1566
Internal Revenue Service
Jersey City, New Jersey 07302

from: William F. Halley, Associate Area Counsel

subject: [REDACTED] Form 872
Tax years: [REDACTED] and [REDACTED]
TIN: [REDACTED]

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Issue

Whether a Form 872 consent to extend the statute of limitations on assessment provided by the corporate taxpayer covering tax years prior to its purchase by another corporation, where the individual signing the extension is an assistant secretary of the taxpayer and vice president and assistant

controller of the corporate purchaser, was properly executed by the taxpayer?

Facts

For this advisory, the facts are based on discussions with Examination and documents supplied by Examination Manager John Capalbo.

██████████ ("██████████") was acquired by ██████████ in or about ██████████. ██████████ purchased all of ██████████'s stock for cash and assumed certain liabilities. ██████████ and its subsidiaries continue in existence today. ██████████ is currently included within ██████████ consolidated group. A representative from ██████████ has supplied a Form 872 dated ██████████ and signed by ██████████, an "Assistant Secretary" of ██████████. ██████████ is also a vice president and assistant controller of ██████████.

A ██████████ Board of Directors Consent, issued on ██████████, just prior to the sale to ██████████, named certain officers for ██████████ and each of its subsidiaries. Generally, it names the ██████████, Vice President(s), Treasurer, Secretary and Assistant Secretary for ██████████ and each subsidiary respectively. ██████████ is listed as the Assistant Secretary for each corporation. The ██████████ Board Consent also includes a general resolution giving the Chairman of the Board of Directors, the Chief Executive Officer, President, Chief Operating Officer, any Executive Vice President, any Vice President, Treasurer and Secretary of ██████████ the ability to, in part, execute documents on behalf of ██████████. The Consent, however, does not provide the Assistant Secretary with this power. ██████████ has also provided the board resolution from ██████████ which designates ██████████ as vice president and assistant controller of ██████████ with the ability to execute all tax returns and other documents, such as extensions, on behalf of ██████████.

On December 5, 2000, our office recommended to Examination manager John Capalbo that he contact ██████████ to discuss the fact that the assistant secretary of ██████████ did not appear to have authority to sign the ██████████ Form 872 extension. In response to Mr. Capalbo's inquiry, the taxpayer supplied a ██████████ Consent of the Board of Directors of ██████████ specifically stating that the Assistant Secretary shall have the same authority to execute documents as was contemplated in the ██████████ Board Consent.

Mr. Capalbo inquired whether ██████████ in his capacities as a vice president and assistant controller of ██████████'s had the

authority to sign the Form 872 on [REDACTED]. Mr. Capalbo also inquired whether [REDACTED] in his capacity as an assistant secretary of [REDACTED] had the authority to sign the Form 872 on [REDACTED].

Discussion

I.R.C. § 6501(c)(4)(A) provides that the taxpayer and Service may consent in writing to an extension of time for assessment of tax.

A. [REDACTED] did not have the authority to sign the Form 872 on [REDACTED] based on his capacity as vice president and assistant controller of [REDACTED].

Treas. Reg. §1.1502-77 provides the authority for a parent corporation to act as agent for a subsidiary. Treas. Reg. §1.1502-77(a) states, in part, generally that "[t]he common parent...shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year."

Specifically, Treas. Reg. §1.1502-77(c) states,

(c) Effect of waiver given by common parent.

Unless the district director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made or levy or proceeding in court begun in respect of the tax for a consolidated return year shall be applicable-

(1) To each corporation which was a member of the group during any part of such taxable year, and

(2) To each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under the provisions of §1.1502-75.

The fact that [REDACTED] is vice president and assistant controller of [REDACTED] does not give the [REDACTED] extension validity. The regulations do not provide for a parent corporation, as an agent, to enter into an agreement to extend the time for assessment for a given tax year on behalf of a

subsidiary if the tax year precedes the subsidiary's inclusion in the parent's group for consolidated return purposes. See Treas. Reg. §1.1502-77(a). Since the tax years for [REDACTED] precede [REDACTED] purchase of [REDACTED], thus preceding [REDACTED] being within [REDACTED] consolidated group, a representative from [REDACTED] cannot sign the extension.

B. [REDACTED] did not have authority to execute the Form 872 on [REDACTED] in his capacity of assistant secretary of [REDACTED].

I.R.C. §6062(a) provides, in part, that "[t]he return of a corporation with respect to income shall be signed by the president, vice president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act." According to Rev. Rul. 84-165, anyone holding one of these positions may likewise sign a consent to extend the time to assess. In our case, at the time that [REDACTED] signed the Form 872 he was an assistant secretary of [REDACTED]. Assistant secretary is not a position listed under section 6062(a). The [REDACTED] Board resolution dated [REDACTED] providing the assistant secretary with the specific authority to enter into agreements on behalf of [REDACTED] did not state that it was to be applied retroactively. Therefore, [REDACTED] did not have the authority to sign the Form 872 on [REDACTED] in his capacity as assistant secretary of [REDACTED].

Overall, it is recommended that a new Form 872 be secured for the tax years ending [REDACTED] and [REDACTED] from [REDACTED]. As of [REDACTED] [REDACTED] can sign the extension on behalf of [REDACTED] and its subsidiaries.

If you have any questions please contact attorney Robert T. Bennett at (973) 645-3244.

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